IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

LETTERS PATENT APPEAL NO. 102 OF 1990
IN
FIRST APPEAL NO. 120 OF 1984

1. Nilkanth Dhondiba Chavan since deceased by his Heirs :

(i) Anil Nilkanth Chavan, Aged 36 years,
(ii)Satish Nilkanth Chavan, Age 31 years,
Both residing at 1681/E, 9th Lane, Rajarampuri, Kolhapur.

(iii) Mrs. Manisha A. Desai, Aged 42 years, daughter, C/o. A.A. Desai, Laxmi Apartments, Carter Road No.3, Behind Ambaji Temple, 601, 6th Lane, Borivali (E), Bombay.

(iv) Asha J. Patil, Age 36 years, daughter residing at Baji Krishi Sykes Extension, Kolhapur.

(v) Mrs. Rekha R. Ginde, daughter, C/o. R.G. Ginde, Vaishali Apartments, 3rd Floor, Dahanukar Wadi, Kandivali West, Bombay.

2. Sau. Savitabai W/o. Nilkanth Chavan, since deceased by her legal heirs:

i) Nilkanth Dhondiba Chavan,
ii)Anil Nilkanth Chavan, since deceased through his heirs:
(a) Smt. Aruna Anil Chavan,
(b) Shri. Ashish Anil Chavan,
(c) Sou. Anupama Dhairyasheel Mane,
(d) Sou. Anjali Anil Chavan

iii)Satish Nilkanth Chavan,

Aged 31 years, son. Nos. (i) to (iii) residents of 1681/E, 9th Lane, Rajarampuri, Kolhapur.

iv) Mrs. Manisha A. Desai, Aged 42 years, daughter, C/o. A.A. Desai, Laxmi Apartments, Carter Road No. 3, Behind Ambaji Temple, 601, 6th Lane, Borivali (E), Bombay.

v) Asha J. Patil, Aged 38 years, daughter, Residing at Baji Krishi Sykes Extension, Kolhapur.

vi) Mrs. Rekha R. Ginde, Age 34 years, daughter, C/o. R.R. Ginde, Vaishali Apartments, 3rd Floor, Dhanukar Wadi, Kandivali (West), Bombay. ...Appellants

Vs.

1. Sou. Umabai W/o. Anant Desai, Age 50 years, Money Lender, C.T.S. no. 1681E Ward, Kolhapur.

2. Anant Waman Desai, since deceased through heirs :

(a) Smt. Umabai Anant Desai,
(b) Shri. Rajeev Anant Desai,

both residing at Hukicberry Drive San Rose, CALIFORNIA 95123, U.S.A. ...Respondents

Mr. N.V. Walavalkar with Mr. V.B. Rajure for Appellants.

Mr. A.K. Abhyankar for Respondent No. 1.

CORAM : F.I. REBELLO &
ANOOP V. MOHTA,JJ.
DATED : SEPTEMBER 03, 2004

ORAL JUDGEMENT (Per F.I. Rebello,J.):

1. The Appellants, original Plaintiffs in a suit filed against respondents, original Defendants for specific performance, in the alternative prayed for some other reliefs. Some of the Prayer Clauses reads as under :

> "(a) Defendant be compelled to give the reconveyance of purchase deed of the suit property in the name of the plaintiffs as per the deed of agreement and get the same registered. On order being passed, the Plaintiff is depositing the amount into Court.
>
> (b) In case of purchase deed being not done by the Defendant No. 1, the same be got done through Court in the names of the Plaintiffs on its completion.
>
> (c) Alternatively, the suit property after being free from mortgage as per the deed of mortgage under Serial No. 7 dated 2.1.1971 be given in actual possession of the Plaintiffs.

(d) It be declared that the Plaintiffs are free from debt as per the Bombay Debt Relief Act and the suit property after being free from debt be given in possession of the Plaintiffs.

(e) In case it is decided that it cannot be done as above, then the account of the mortgage be taken and after settling the amount payable/receivable, the amount be given to the Plaintiffs or the same be given from the Plaintiffs to the Defendant No. 1 and for free from mortgage, necessary re-conveyance of purchase deed be got done in the name of the Plaintiff from the Defendant No. 1 and in the event of her not doing so, through court and the actual possession of the property be given to the Plaintiffs."

2. The case of the Appellants was that they were the owners of the property which property was to be put in auction in Special Darkhast No. 78 of 1970.

The financial condition of the appellant was not sound and if the amount was not paid, the property was to be sold in auction. The value of the property was approximately Rs. 2 lacs. and it is contended that if the property was auctioned then plaintiffs would have suffered loss for life. Defendant No. 1 had knowledge of the condition of the Plaintiff. The Plaintiff asked for a loan of Rs.50,000/- from the defendant in order to pay the liabilities of the creditors. Defendant No. 2 agreed to give the loan of Rs.45,000/- after taking the same from his wife, Defendant No. 1 or in her name, and the Plaintiff agreed to take this amount as loan. It was agreed between the Plaintiff and the defendants that for the security of this amount, mortgage-possession of the suit property was to be given to the defendants. However, as the Defendants had no money-lending licence, and as the plaintiff wanted longer period for repayment, it was agreed that the plaintiff should prepare a document of term-purchase in the name of Defendant No. 1. According to that, purchase deed was written on stamp paper. However, a clause of reconveyance was to be included meaning thereby that in case of repayment of loan by the Plaintiff to the Defendant No. 1 within the stipulated

period and acceptance thereof by the Defendant No. 1, reconveyance of the property was to be got done in the name of the Plaintiff. That was left to be included in the purchase deed. After noticing this mistake and on reading the purchase deed, the Defendant made an agreement at the same time i.e. on 1.1.1971 to give reconveyance of the purchase deed of the suit property in the name of the plaintiffs. That deed was also registered. It is the case of the Plaintiff that they were ever willing to comply with the condition of the agreement and to pay the amount to the defendants Plaintiff was also ever ready and is ready to give or bear the expenditure of reconveyance of purchase deed. Though Plaintiff asked defendant No. 1 for getting the reconveyance deed in writing, the defendant avoided the same. Plaintiff then sent a registered notice dated 9.6.1978 informing the defendant to give reconveyance of purchase deed in writing. It is the case of the Plaintiff that defendant mischievously demanded exorbitant amount by way of reply. As the Plaintiffs were not agreeable to the same the Plaintiffs were compelled to file the suit as the defendants were not willing to act in accordance with the agreement. Relief was therefore, sought asking for

reconveyance/purchase. In the alternative prayer was sought on the basis that the various deeds constituted a deed of mortgage and as such the suit property after being freed from mortgage as per the deed of mortgage under Serial No. 7 dated 2.1.1971 be given in actual possession of the Plaintiffs. Another alternative relief prayed for if the document was construed as a mortgage was that as the amount advanced was a loan, it was not recoverable under the Debt Relief Act. There are also some other prayers.

3. The defendants filed written statement contending that defendant No. 2 is the tenant on the ground floor. Adverting to the receipt of notice served on behalf of the Plaintiff, it is pointed out that an additional amount of Rs.4646/- in addition to Rs.45,000/- ought to be paid to the defendant by the Plaintiff for reconveyance and accordingly Plaintiffs were so informed. The Plaintiff did not do anything and as such committed the breach of the agreement. The Defendant also denied that the Plaintiff No. 1 is debtor under the Bombay Debt Relief Act. The Plaintiff also denied the transaction is in the nature of

mortgage. The defendant No. 2 filed written statement. It is contended that as the Plaintiff wanted the building to be sold and Defendant No. 1 wanted the same to be purchased, after fixing the price of the building, defendant No. 1 purchased it for an amount of Rs.45,000/-.

4. The trial court on consideration of the material was pleased to dismiss the suit. Various issues were framed including whether the agreement was in the nature of mortgage in view of the agreement of resale on the same day and other attending circumstances and consequently whether the plaintiffs are entitled to redeem the mortgage after the period of 9 years, as per the agreement of resale of the suit property. An issue was also framed whether the Plaintiffs are ready and willing to pay Rs.45,000/- and charges of registration for resale of the suit property. That was answered in the negative. The learned Judge also answered issue No. 10, namely whether the contract of resale came to an end due to failure of the Plaintiffs in the affirmative. The learned Judge negatived the issue that the transaction was a mortgage and placed reliance on the provisions of

Section 58(c) of the Transfer of Property Act. The trial court while answering issue No. 5 observed that the Plaintiffs case was that they were and ready to abide by these conditions namely payment of Rs.45,000/-. The trial court then relied on the evidence of the Plaintiff to come to the conclusion that the Plaintiff had not shown that he had made preparation for the same and therefore, Plaintiff had failed to prove their readiness and willingness and placed reliance on the judgement reported in 1947 Mah.L.J. 120 and accordingly answered Issue No. 5 in the negative. The court therefore, held that the agreement cannot be enforced. It is not necessary to go into the other aspects of the matter.

5. Aggrieved, the appellants preferred First Appeal which was numbered as First Appeal No. 120 of 1984. Before the First Appellate Court the only argument advanced was for specific performance of the agreement of reconveyance. The other reliefs were not pressed. Even in the oral evidence, the Appellant only sought specific performance. The only evidence regarding the other relief was the following sentence in the examination in chief :

"In the alternative, I have also prayed for the redemption of the suit mortgage of the suit house."

Noting the arguments advanced on behalf of the appellant and the Respondent, the learned Judge fixed points for consideration. The learned Judge held that the suit transaction is one of sale and an agreement of reconveyance and not one of mortgage. After so holding the learned Judge in Paragraph 25 of the Judgment went on to proceed to examine whether the suit transaction can be termed as a mortgage. Really speaking once there was a finding recorded on facts that the transaction was one of sale and an agreement of reconveyance, there was no question of going into the issue whether it was a mortgage. Secondly the Appellant had given up that issue at the appellate stage as can be seen from paragraph 10 of the Judgement of the First Appellate Court. To consider whether the transaction was a mortgage, the learned Judge relied on various judgments and once again came to the same conclusion that the agreement was one of sale and reconveyance and not a mortgage.

. The learned Judge then considered whether the Plaintiffs are entitled to specific performance of the agreement of reconveyance. The learned Judge observed that the Plaintiffs had pleaded alternate and inconsistent pleas by contending on the one hand that the first plaintiff is a debtor and his debt has been discharged under the Maharashtra Debt Relief Act and is entitled for reconveyance without being required to pay for the same. It is set out that his application before the Mamlatdar under the Maharashtra Debt Relief Act is pending and he had made an offer to pay without prejudice and conditionally upon the ultimate outcome of the proceedings under the Maharashtra Debt Relief Act. The court then posed to itself a question as to whether the Plaintiffs on account of rival pleas set up by them, disentitled themselves to claim decree for specific performance. The various judgements relied upon by the Appellants were distinguished. Dealing with the aspect of inconsistent pleas in Paragraph 32, the learned Judge observed that the Plaintiff appellant must show that each of such pleas is maintainable and that in so far as the relief of specific performance is concerned, the matter must be examined in the light of the provisions of the

Specific Relief Act. The learned Judge also referred to Section 29 of the Specific Relief Act. The learned Judge then observed that there is yet another reason for holding that the Appellant has failed to make out a case for specific performance of the contract. The plaint must allege that in a suit for specific performance the Plaintiff should allege that he is ready and willing to perform his part of the contract and in the present case, no such averment is made in the plaint and on the other hand that the agreement was as a result of fraud and undue influence and was not binding on them. At this stage, it must be said that this seems to be factually incorrect considering the averments in paragraph 3 of the plaint. Relying on the various judgements, the learned Judge held that before a Plaintiff can enforce an agreement of reconveyance, he is required to observe the terms and conditions which are imposed upon him by that agreement and it would not be open to the plaintiff to put his own construction on the terms but he would be bound by the terms as determined by the Court. It will also not be open to the Plaintiff to vary the terms according to his interpretation and yet claim specific performance. The pleas taken by the Plaintiffs including the Maharashtra

Debt Relief Act were noted and the court held that the Plaintiff by putting up rival pleas disentitled himself to a decree for specific performance and consequently dismissed the appeal. The learned Judge has given yet another reason for rejecting the relief of specific performance by holding in Paragraph 32 of the Judgment that the Plaintiff has alleged that the agreement was as a result of fraud and undue influence and was not binding on him. A perusal of the English translation of the plaint on record does not show any such averment. Neither in the oral evidence had the appellant taken such a plea. Another finding was that there was a breach committed by the Appellant. Aggrieved by that judgement the present L.P.A.

6. At the hearing of this appeal, on behalf of the appellants, their learned counsel contends that merely because appellants/Plaintiffs had raised alternative pleas by itself cannot disentitle them to the relief of specific performance as the Deed of sale and the agreement for reconveyance were entered into on the same day and the agreement for reconveyance was provided for by separate agreement, as in the sale deed no provision was made for reconveyance though agreed to. It is also

set out that there is no dispute that there was an agreement for reconveyance. The only question was on the construction of the agreements whether they were a sale deed with agreement for reconveyance and or mortgage. If the deed is held to be a mortgage considering the loan advanced, Plaintiff would be entitled to the benefit under the Debt Relief Act if he satisfies the predicate as it is purely consequential. It is pointed out that the suit for specific performance was filed within the period contemplated by the agreement. The Plaintiff/appellant had pleaded and set out that they were ever willing and are willing to pay the amount to the Defendants in terms of the agreement and was ever ready and is ready to bear the expenditure for reconveyance of purchase deed. The Appellant had led evidence on that count. The two courts did not address themselves to this important issue and in fact the first appellate court wrongly proceeded on the basis that there was no pleading about readiness and willingness when in fact there were specific pleadings. The courts having not considered these aspects the judgments are liable to be set aside. It is then pointed out that the main relief in the suit was for specific performance and the other reliefs were in the

alternative if the relief for specific performance was not granted or could not be granted. There was no bar on the Plaintiff taking inconsistent pleas considering the provisions of Order VIII rule 7 of the Code of Civil Procedure. The inconsistent pleas if and at all were on a true construction of the agreement. The issue whether an agreement is a sale deed coupled with an agreement for reconveyance or a mortgage is a vexed one and reliance for that purpose is placed in the judgement of Chunchun Jha Vs. Ebadat Ali and another, AIR 1954 Supreme Court 345. Merely because the appellant had also sought redemption of the mortgage in the alternative would not disentitle the appellant to the relief for specific performance. Though the Plaintiff had prayed for relief under the provisions of the Maharashtra Debt Relief Act, he had given up the plea at the trial stage itself as he led no evidence in examination in chief on that account. The answers elicited in cross examination would be of no consequence. It is also submitted that the findings by the two courts below that there was a breach of contract is on a mistaken assumption of facts and law.

. On the other hand on behalf of the respondents,

their learned counsel contends that Section 29 of the Specific Relief Act requires that the Plaintiff in a suit for specific performance of the contract in writing may pray in the alternative that if the contract cannot be specifically enforced, it may be rescinded and delivered upto be cancelled, and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly. In the instant case it is pointed out that the Plaintiff/appellants could not have raised alternative pleas which would have effect of the Plaintiff not willing and ready to perform the terms of the contract and on this ground alone, the suit must be dismissed. It is then submitted that from the material on record, it was clear that the Plaintiff appellant at the time the notice was served nor at the time of filing of the suit or even when evidence was recorded was in a position to perform his part of the contract as he did not have the necessary consideration. It is therefore set out that this is not a case where the plaintiff was ready and willing to perform his part of the contract and consequently the suit ought tobe dismissed. Lastly it is contended that if the notice served by the Plaintiff on the Defendants is seen it will be clear that the Plaintiff had not in

unequivocal terms called upon the defendant to perform his part of the contract but had set up inconsistent pleas. It is therefore, submitted that the orders of the courts below are not liable to be interfered with.

7. From the above, the questions that arise for consideration will be the following :

(a) Whether the alternative reliefs sought in the plaint are inconsistent and if so whether Appellants were disentitled for relief of specific performance.

(b) Were the Appellants considering that at the time when a notice was served, at the time of filing of the plaint and at the time of evidence, did not have personally with them the consideration for payment, can be said to be ready and willing to perform his part of the contract.

(c) On the facts pleaded and evidence led, were the Appellants entitled for a decree for specific performance.

. At the outset it may be pointed out that the appellants have deposited a sum of Rs.60,000/- on their own volition before the First Appellant Court on 29.1.1990 in Civil Application No. 410 of 1990 in First Appeal No. 120 of 1998. The judgement was pronounced on 30.1.1990.

8. Were the Appellants disentitled to raise pleas in the alternative and if prayed were they not entitled for the relief of specific performance. Reliance was placed on behalf of the respondents in the case of Prem Raj Vs. The D.L.F. Housing and Construction (Pvt) Ltd. AIR 1968 Supreme Court 1355. In that case, Plaintiff sued for declaration that the contract against him is void and inoperative and having been obtained by undue influence and in the same suit in the alternative asked for the relief of specific performance of the same contract. The Apex Court considering the language of Section 37 of the Specific Relief Act, which is similar to the Section 29 of the Specific Relief Act, 1963 held that it is permissible to sue for specific performance and alternatively sue for rescission of the contract if specific performance can not be granted. In other words it is not open

to a plaintiff to sue for rescission of the agreement and in the alternative to sue for specific performance. Can it be said that the alternative relief of construing the document as a mortgage disentitles the Appellant the relief of specific performance. In the instant case, the documents are not disputed. What is disputed is their construction. The evidence on record proves that a sum of Rs.45,000/- was received by the Appellant as consideration. The Appellants were entitled to get the property reconveyed for the same consideration after 7 years and before nine years without any interest on the principal amount. Oral evidence was led to show that the amount advanced was a loan. However, considering Section 58(c) of the Transfer of Property Act, the document in law could not be so construed. The Appellants were ready to perform what they had to perform under the agreement. They had so pleaded and had led evidence to that effect. The agreement itself was entered into under circumstances earlier set out, namely that the property was for sale in execution. In our opinion, merely because of the alternative prayer and on the facts of the present case, it cannot be said that the Appellants prayer for specific performance could not be entertained.

The alternative relief was based merely on a construction of the document. The relief under the Maharashtra Debt Relief Act was consequential to a finding that the document created a mortgage. There were therefore not inconsistent pleas. In the evidence, the relief of redemption was merely sought in the alternative. That relief was given up before the 1st Appellate Court. Apart from that considering section 58(c) of the Transfer of Property Act, the document could never have been construed as a deed of mortgage. The appellants cannot be saddled with dire consequences for wrong legal advice, in a suit validly instituted for specific performance, with proper averments as to readiness and willingness to perform their part of the contract.

9. The next contention on behalf of the respondent for refusing grant of specific relief and which has found favour with the courts below is that the appellant Plaintiff had no money and therefore, it must be held that he was not ready and willing to perform his part of the contract. Under the explanation to Section 16(c) of Specific Relief Act, the requirement of payment of money only arises if the court directs deposit and the

plaintiff fails to tender. In that context let us examine the judgement in the case of N.P. Thirugnanam Vs. R. Jagan Mohan Rao AIR 1996 Supreme Court 116. In that case on evidence it was held that the Plaintiff was never ready with resources and money to fulfil his part of contract and in that context suit was dismissed. But the judgement makes it clear that this was when the plaintiff was asked to deposit the consideration or furnish bank guarantee as per the directions of the trial court. The dismissal of the suit on those findings of fact was upheld. In His Holiness Acharya Swami Ganesh Dassji Vs. Shri. Sita Ram Thapar, AIR 1992 SC 2095 the Apex Court was observed that the readiness and willingness to perform has to be inferred from the conduct of the party and attending circumstances. In that case the purchaser did not have enough funds to pay consideration and on the facts of the case held that the Plaintiff was not ready to perform his part of the contract. In the instant case, we have noted in the notice itself, the Plaintiff had intimated to the defendant his readiness and willingness to perform his part of the contract. In the suit also plaintiff has averred his readiness and williness to perform his part of the

contract. He had averred that he had to file a suit as defendants were not willing to act according to deed of agreement. In his cross-examination he denied the suggestion that he was never ready and willing to pay the sums to the defendants. In his evidence questions were put to him whether he had money with him to pay on the date the notice was served o the Respondent, date of filing of the suit and when his evidence was recorded. The test would be whether the Plaintiff was in a position to pay the money on direction by the court and not whether he had the money. No such question was ever put to him to suggest that if he was called upon by the Court to deposit the money, he had no means to deposit the money or make it available for deposit. Evidence has come on record that the Appellant's son was working as an Excise Inspector. In our opinion, therefore, considering the averments by the plaintiff and that the money was in fact deposited before the judgement in First Appeal, it cannot be said that the Plaintiff appellant was not ready and willing to perform his part of the contract. The mere fact that he did not have money on the day the notice was served, the day when plaint was filed or at the time of his evidence was of no consequences. No

question was put to him that if he was called upon to deposit the money he would not be in a position to so deposit. If the Court had directed him to deposit the money and he had not so deposited, then only that question would have arisen.

10. The question then that has to be considered is whether the Plaintiffs are disentitled to relief of specific performance on account of what is set out in Section 29 of the Specific Relief Act. Section 29 sets out that in a case where Plaintiff has sought specific performance of a contract in writing the Plaintiff can pray in the alternative that if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled. This therefore, is a right conferred by Statute on the Plaintiff in a suit for specific performance to pray in the alternative that the contract cannot be performed to get it rescinded. That is not the case here. Factually what the Plaintiff is contending in the instant case is firstly for a decree of specific performance and in the alternatively that the document namely deed of conveyance coupled with the agreement to sale on a conjoint reading should be treated as a mortgage. If it be a mortgage then for redemption of

mortgage. In other words, the sale deed and agreement for reconveyance as is sought to be construed in two different ways and accordingly reliefs sought. Firstly as a sale deed and an agreement for reconveyance. If not so, as mortgage on the basis that defendants had given to the Plaintiff a loan. Therefore, the relief in the alternative is a relief of redemption of mortgage. The State Legislature has enacted the Maharashtra Debt Relief Act under which certain loans are no longer recoverable and a suit at the instance of a person who has advanced the loan cannot be maintained for its recovery. This can only be proceeded with, if it is held that the agreement for reconveyance in fact and in law is not so, but is a mortgage. The main relief is for specific performance of the contract on payment of consideration of Rs.45,000/-. The first appellate court in fact has recorded a finding of fact that the deed of sale is a sale deed and the agreement is an agreement for re-conveyance. The Plaintiff in respect of specific performance of the agreement has specifically averred and prayed that he is ready and willing to perform his part of the contract and make payment in terms of the contract. The first Appellate Court have wrongly held

otherwise in spite of specific pleadings in Paragraph 3 of the Plaint. The pleas as raised for the relief of specific performance and in the alternative for redemption of mortgage or cancelling of debt cannot be said to be pleas which could not be raised or be a bar for the court to consider to grant the relief of specific performance. They were based on a true construction of the documents and their contents. In fact the Appellants only in the event the relief of specific performance was not granted in the alternative, had prayed for redemption of mortgage. Such a relief is not barred by Section 29 of the Specific Relief Act. It is theretofore, clear from the above discussion that the main relief sought for by the appellant was for specific performance of the contract. The respondents themselves had so understood when the notice was served on them by the appellants and had expressed their readiness to perform their part of the contract if apart from the consideration set out in the contract of reconveyance, the Appellants were willing to pay additional sum as set out in their reply to the Plaintiff's notice on account of the expenses incurred by the respondents for repairs carried out to the suit house clearly the bar of Section 29

would not arise as argued on behalf of the Respondents.Section 29 merely enables a Plaintiff to a suit if he cannot get specific performance then alternatively to pray for recission of contract. It is not a bar to a Plaintiff to seek reliefs which he may be entitled to in law on a true construction of the Plaint.

11. That leaves us with the last contention namely whether on the facts of this case, and considering Section 20 whether this court can direct specific performance of the contract. The first Appellate Court has for the following reasons, rejected to consider the plea for specific performance. Firstly that there were inconsistent pleas which issue has been earlier dealt with; Secondly on the ground that the Appellant had not pleaded that they were and are ever willing to perform their part of the contract. This is factually incorrect as there are pleas in paragraph 3 of the plaint; Thirdly on the ground that there was a breach of the contract. Here again the finding is perverse. The Appellant had given notice for specific performance with and had filed the suit within time. They had averred that they were ever ready and willing to perform their part of the contract in terms of the

contract: Fourthly on the ground that the Appellant had alleged that the agreement was as a result of fraud and undue influence and was not binding. No such plea was taken in the pleadings or in the evidence.

. In the instant case, it is clear that the sale of Plaintiff was a distress sale considering that the property was to be put up for sale by the bank in execution. The Plaintiff has examined apart from himself other witnesses to point out that the value of the property was much higher and would fetch atleast Rs. 2 lacs. His oral evidence is supported by the evidence of Shankarrao Nikam no doubt related to the Plaintiff. The daughter of the said witness is married to the Plaintiff's elder son Anil who is serving in the Government as Excise Inspector. He has deposed that the Plaintiff was heavily indebted and one of his houses was put to sell, he wanted to sell his house and so he got a sale deed of one house in the name of his daughter. The consideration was not adequate. He then suggested to him that he should be in search of a person who could give him a loan to satisfy his debts. One purchaser had approached him and offered Rs.1,50,000/- as price of the suit

house. It is also deposed that on taking advice of others, they came to know that instead of selling the suit house, loan be raised by mortgage transaction to the extent of Rs.50,000/-. The Respondent had given the said suggestion and as Respondent was residing in the said house, Appellant No. 1 agreed to the proposal. The learned appellate court has chosen to disbelieve the witness. Witness No. 3 Rajarash Shridhar Beri is an Architect who had valued the suit house at Rs.1,40,000/- in 1970-71 as the then prevailing prices. The valuation in 1981-82 was at Rs.2,87,000/-. Similarly another witness examined was Hindurao Ganpatrao Parakhe examined who has deposed that he was willing to purchase the house for Rs.1,50,000/-. Respondent No.1 examined himself and her husband and also another witness for the purpose of showing the expenses incurred during their residence. No evidence was led to show that the price of the property as sought to be proved through the Appellant's witnesses was not the real price. Considering the evidence on the test of pre-ponderance, the evidence of the Appellant's witness ought to have been accepted. The evidence led on behalf of the Appellant Plaintiff as to the value of the house at the time

of sale has not been disputed or controverted. The Appellant therefore, had proved that the sale deed was under valued. The findings therefore, by the learned First Appellate Court that the Appellants had failed to establish that price was not adequate will have to be set aside. Apart from that whether the consideration for the sale was adequate or not really would not be of much material assistance except to the limited extent of considering whether discretion should be exercised in favour of the Appellant. Definitely the price of the suit house was much more than Rs.45,000/- which was paid as consideration. From the deed of conveyance and agreement for reconveyance a large part of the consideration of Rs.40,076/- was to be retained by the Defendant to be paid towards the loan amounts due by the Appellant to third parties as set out in the conveyance deed. From the fact that the agreement for reconveyance provided for the payment of Rs.45,000/- after 7 years and before nine years by itself would indicate that the transaction was much more than a mere deed of conveyance. No interest was provided for. It is in these circumstances that the court must consider whether the discretion should be exercised in favour of the Plaintiff.

. Section 16 of the specific Relief Act provides that specific performance of the contract cannot be enforced in favour of a person who would not be entitled to recover compensation for its breach or person has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed or acts in fraud of the contract, or willfully acts at variance with, or in subversion of, the relation intended to be established by the contract or who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. In the instant case, the Appellant had pleaded that he was ever ready and willing to perform the terms of the contract. In his evidence it was so reiterated. The Appellant has also not acted in variance with the terms of the contract. The Application under the Debt Relief Act cannot be considered against the Appellant as it is in furtherance of a right conferred by an Act if the amount received was held to be a loan. The Appellant in oral evidence did not seek this

relief. In other words it was given up in the suit. In explanation to section 16, for the purpose of Clause (c) it is set out that where a contract involves the payment of money, it is not essential for the Plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court. It is therefore, clear that what is relevant is not that money is available but the failure to deposit the money when the court so directs to deposit. In the instant case that stage never arose. In fact in the first appeal, the Plaintiff has deposited the sum of Rs.60,000/-. Even if the evidence of the appellant on that count is carefully considered, it is not possible to construe the evidence as is sought to be construed on behalf of the defendant.

Para 12 of the evidence reads as under :

> "I am not doing any business or work, since last 10 years. I have no source of income. I have no bank account. I am not to receive any amounts from any one. I have no amount with me. I am money less since last 10 years. At the time of giving notice (9.6.1978) I have no my own accounts. It is not true to say that I

was never ready and willing to pay the sums of the defendants, for the reconveyance of the suit house."

. In the earlier part of the evidence, the Plaintiff had deposed as under :

"..... I am and I was ready to pay the consideration as per the agreement. I am ready to pay the consideration amount of Rs.45,000/-. I was also ready to pay the said sum. I am also ready to pay the costs of the registration of the sale deed".

. It is no doubt true that the courts below have proceeded on the footing that the Appellants have been taking inconsistent pleas. In our opinion, as earlier explained the pleas really speaking were not inconsistent. What was before the trial court was issue of interpretation of the documents as to whether it is sale coupled with an agreement for reconveyance or a mortgage. As noted by the Apex Court in Chunchun Jha (supra) that is still a vexed question though in the instant case on account of Section 58(c) of the Transfer of Property Act it

cannot be said to be mortgage. It is no doubt true that the Plaintiff tried to take advantage of the Debt Relief Act by his pleas in the plaint. However, that was in the alternative to the relief of specific performance and if that relief was rejected. Merely because of the intervening legislation, it cannot be said that the discretion ought not to be exercised in favour of the Plaintiff. We are of the opinion that there was a subsisting contract. The appellant within the period of limitation sought specific performance and filed a suit on refusal by the Respondent to perform the contract unless the Respondent paid additional amounts not provided for in the agreement. The appellants made necessary averments for specific performance. The consideration for the sale deed was inadequate. The appellants without being directed to do so, deposited an amount of Rs.60,000/- with the 1st Appellate Court against the consideration of Rs.45,000/-. Considering these aspects on record, there is no reason why discretion should not be exercised in favour of the Appellant when all through out they have been ready and willing to perform their part of the contract and in fact deposited the amount before the Appellate Court. We are therefore,

inclined to allow the prayers for specific performance and decree the suit by setting aside the judgement of the trail court and First Appellate Court.

10. In the light of that the following order :

(a) The appeal is allowed in terms of Prayer Clause (a) of the plaint. The stamp fees if any and cost of registration will be borne by the appellants. On such conveyance, the amount deposited be paid to the respondents along with accrued interest, if any.

(b) On Respondents failure to enter into deed of conveyance, within four months from today appeal is also allowed in terms of Prayer Clause (b) of the plaint.

In the circumstances of the case, there shall be no order as to costs.

The learned counsel for the respondents seeks stay of the order. Considering

that there were two judgements in favour of the respondents, there will be stay for a period of twelve weeks from today.

(F.I. REBELLO,J.)

(ANOOP V. MOHTA,J.)